

1 WILLIAM H. SHIBLEY  
California State Bar No. 56093  
2 **LLOYD & MOUSILLI, PLLC**  
11807 Westheimer Road  
3 Suite 550 PMB 944  
4 Houston, TX 77077  
5 Tel: (512) 609-0059  
6 Fax: (281) 783-8565  
*litigation@lloydmousilli.com*

7 **ATTORNEYS FOR DEFENDANTS**

8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
10 **WESTERN DISTRICT**

11  
12 **DAVID HOUGH; et al**

13 *Plaintiffs,*

14  
15  
16  
17 **v.**

18  
19 **RYAN CARROLL; et al**

20 *Defendants.*

Case No.: 2:24-cv-02886

Assigned for all purposes to:  
JUDGE WESLEY L. HSU

**JURISDICTIONAL DEFENDANTS**  
**RYAN CARROLL; MAX K. DAY;**  
**MAX O. DAY; MICHAEL DAY;**  
**YAX ECOMMERCE LLC;**  
**PRECISION TRADING GROUP,**  
**LLC; AND WA DISTRIBUTION**  
**LLC'S REPLY IN SUPPORT**  
**OF AMENDED MOTION TO**  
**COMPEL ARBITRATION AND**  
**MOTION TO STAY**

Hearing: August 23, 2024 1:30 PM PT

Action Filed: April 9, 2024  
Trial Date: N/A

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. STATEMENT OF FACTS

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2  
3 1. In regard to *Individual Claimants v. Yax Ecommerce LLC d/b/a Wealth*  
4 *Assistants LLC*; American Arbitration Association (“AAA”) Case No. 1-24-0003-  
5 2735 (“**Mass Arbitration**”), Jurisdictional Defendant’s Counsel initiated the  
6 payment of the arbitration fees as required under the agreement on May 10, 2024 at  
7 6:58 a.m. PT. *See* Declaration of A. Gluski; Exhibit A Mass Arbitration Payment  
8 Receipt dated May 10, 2024.  
9

10  
11 2. After payment was initiated, the bank stopped the transaction due to questions  
12 regarding the signing authority of the individual(s) responsible for authorizing the  
13 payment. *See* **Declaration of A. Gluski**.  
14

15 3. Upon learning of the issue, Defense Counsel immediately took steps to resolve  
16 the matter and correct the signing authority issue. Declaration of A. Gluski  
17

18 4. Before the corrections could be fully implemented, Plaintiffs chose to dismiss  
19 their arbitration claims. *See* **Exhibit B Correspondence between Nico Banks and**  
20 **American Arbitration Association (“AAA”)**. Despite Jurisdictional Defendants’  
21 good-faith efforts, the payment was not processed before this dismissal. Declaration  
22 of A. Gluski  
23

24  
25 5. In regard to *Benjamin David v. Yax Ecommerce LLC d/b/a Wealth Assistants*  
26 *LLC*; AAA Case No. 01-23-0004-9691 (the “**David case**”), Nico Banks accused Yax  
27 Ecommerce LLC d/b/a Wealth Assistants LLC (“**Wealth Assistants**”) of failing to  
28

1 pay for the arbitration. However, Wealth Assistants made payment on February 6,  
2 2024. **See Exhibit C David Case Arbitration Receipt dated February 6, 2024.**

## 3 4 II. ARGUMENT

### 5 A. The Federal Arbitration Act preempts Sections 1281.97 and 1281.98 6 of the California Code of Civil Procedure, making them inapplicable 7 to the present case

8 6. CCP § 1281.97 is preempted by the Federal Arbitration Act. *Belyea v.*  
9 *GreenSky, Inc.*, 637 F. Supp. 3d 745, 756-57 (N.D. Cal. 2022). The *Belyea* Court  
10 recognized that other California courts had made contrary holdings, but the analysis  
11 in those opinions sidestepped the patently adverse consequence at the very heart of  
12 those sections—the invalidation of the arbitration provision.  
13

14  
15 *CCP § 1281.97 is a stick*—failure to pay within 30-days constitutes  
16 material breach of the arbitration agreement and waiver of the right to  
17 enforce the contract—not a carrot to incentivize arbitration. *While*  
18 *there is a benefit for paying on time, that benefit is simply not being*  
19 *hit by the stick*—i.e., losing a contractually binding right to arbitrate  
20 disputes. *CCP § 1281.97 only aids arbitration because failure to*  
21 *comply makes the arbitration agreement unenforceable.* That is  
22 exactly what 9 U.S.C. § 2 prohibits unless all contracts would be  
23 unenforceable under the same circumstances.

24 *Belyea*, 637 F. Supp. 3d at 757.

25 7. Opposing Counsel struggles mightily to undermine the intuitive sense that  
26 *Belyea* makes. The simple truth is loss of a bargained for right to arbitrate represents  
27 a penalty specific to arbitration contracts. That, in the words of the court, “is exactly  
28 what 9 U.S.C. § 2 prohibits.”

1 **B. Sections 1281.97 and 1281.98 of the California Code of Civil**  
2 **Procedure do not apply to the instant action because those sections**  
3 **only apply to “consumer” transactions and the transaction before the**  
4 **court was an agreement to establish a profit-generating, commercial**  
5 **enterprise.**

6 8. Sections 1281.97 and 1281.98 of the California Code of Civil Procedure apply  
7 to arbitration clauses that arise in the context of “employment or consumer” actions.  
8 The definitions for that chapter of the code state: “‘Consumer’ means an individual  
9 who seeks, uses, or acquires, by purchase or lease, any goods or services *for personal,*  
10 *family, or household purposes.*” CAL. CIV. PROC. CODE ANN. § 1280 (West).

11 9. This is not a consumer case. The transaction that is the subject of the Plaintiffs’  
12 claims was not for personal, family, or household purposes. It was to establish a profit-  
13 generating commercial enterprise. The Plaintiffs were not going to use the businesses  
14 established pursuant to the contract in their homes, for their families, or on their  
15 person in any sense. This was an investment transaction. Consequently, Sections  
16 1281.97 and 1281.98 are inapplicable to the present case.

17 **C. Jurisdictional Defendants Have Not Waived Their Right to**  
18 **Arbitration because they made reasonable, timely, good-faith efforts**  
19 **to pay the arbitration fees but Plaintiffs dismissed the arbitration**  
20 **claims before the fees could be paid**

21 10. Even assuming Sections 1281.97 and 1281.98 of the California Code of Civil  
22 Procedure apply, the Jurisdictional Defendants have not waived their right to  
23 arbitration. Sections 1281.97 and 1281.98 do state that a party that does not pay  
24 arbitration fees is in breach of the arbitration agreement; however, the Jurisdictional  
25 Defendants made reasonable, timely, good-faith efforts to pay those fees.

1 11. Payment was initiated by Defense Counsel, but stopped by the bank when  
2 questions regarding signing authority arose. Declaration of A. Gluski; Ex. A, B, C.  
3 Defense Counsel made reasonable, timely, good-faith efforts to correct the problem,  
4 but before those corrections could be implemented, Plaintiffs dismissed their  
5 arbitration claims. Declaration of A. Gluski; Ex. A, B, C. The only reason that the  
6 arbitration ended was because Plaintiffs dismissed their claims before the  
7 Jurisdictional Defendants could complete payment.  
8  
9

10 12. The Jurisdictional Defendants did not knowingly or willfully fail to pay; they  
11 had the ability to pay the fees and would have except for unforeseeable transaction  
12 problems. Consequently, the Jurisdictional Defendants have not waived their right to  
13 arbitration.  
14

15 **D. Jurisdictional Defendants have preserved their right to arbitration**  
16 **because they have acted consistent with their right to arbitrate**

17 13. Because California policy heavily favors of arbitration, “waivers are not to be  
18 lightly inferred and the party seeking to establish a waiver bears a heavy burden of  
19 proof.” *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129, 143 (Cal.  
20 2014)(internal quotes omitted), *overruled by Quach v. California Com. Club, Inc.*,  
21 No. S275121, 2024 WL 3530266 (Cal. July 25, 2024), *abrogated by Viking River*  
22 *Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022). “[A]ny doubts regarding a waiver  
23 allegation should be resolved in favor of arbitration.” *Quach*, 2024 WL 3530266, at  
24 \*4.  
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1 14. The analysis of if a party has waived their right to arbitrate is more detailed than  
2 the explanation provided by Opposing Counsel. The California Supreme Court has  
3 identified the following factors as relevant for consideration:

- 4
- 5 (1) whether the party's actions are inconsistent with the right to arbitrate;
  - 6 (2) whether the litigation machinery has been substantially invoked and the  
7 parties were well into preparation of a lawsuit' before the party notified the  
8 opposing party of an intent to arbitrate;
  - 9 (3) whether a party either requested arbitration enforcement close to the trial  
10 date or delayed for a long period before seeking a stay;
  - 11 (4) whether a defendant seeking arbitration filed a counterclaim without asking  
12 for a stay of the proceedings;
  - 13 (5) whether important intervening steps have taken place, e.g., taking advantage  
14 of judicial discovery procedures not available in arbitration; and
  - 15 (6) whether the delay 'affected, misled, or prejudiced' the opposing party.

16 *Spracher v. Paul M. Zagaris, Inc.*, 252 Cal. Rptr. 3d 417, 419 (Cal. App. 1st Dist.  
17 2019), *as modified* (Sept. 17, 2019)

18 15. The Jurisdictional Defendants' actions were consistent with the right to arbitrate  
19 in that they made reasonable, timely, good-faith efforts to pay those fees. Declaration  
20 of A. Gluski; Ex. A, B, C. The only reason that the arbitration ended was because  
21 Plaintiffs dismissed their claims before the Jurisdictional Defendants could complete  
22 payment.

23 16. Claims were first asserted in arbitration and voluntarily dismissed by Plaintiffs;  
24 as a result, the Jurisdictional Defendants did not invoke the machinery of litigation  
25 prior to filing suit. Plaintiffs' hasty move to federal court despite the Jurisdictional  
26 Defendants good-faith efforts is a form of forum shopping that must be discouraged  
27 to preserve California's strong policy favoring arbitration.  
28



1 17. The Jurisdictional Defendants did not wait until close to the trial date to ask for  
2 arbitration and asked for a stay early on in this case. The Jurisdictional Defendants  
3 sought to compel arbitration prior to the conduct of any substantial discovery. No  
4 counterclaims have been filed. The Plaintiffs have not been misled or prejudiced  
5 because the Jurisdictional Defendants have made no secret that this case belongs in  
6 arbitration from the beginning.  
7

8  
9 **E. The arbitration clause is not unconscionable because the Plaintiffs**  
10 **were business investors, not consumers, the arbitration clause was**  
11 **conspicuous, and the Plaintiff are collectively able to afford the costs**  
12 **of arbitration**

13 18. The court may only refuse to compel arbitration if the party  
14 opposing arbitration satisfies its burden of proving that the arbitration provision is  
15 both procedurally unconscionable and substantively unconscionable. *Fuentes v.*  
16 *Empire Nissan, Inc.*, 90 Cal. App. 5th 919 (2023); *Gostev v. Skillz Platform, Inc.*, 88  
17 Cal. App. 5th 1035, 1056-1061 (2023); *Dougherty v. Roseville Heritage Ptrs.*, 47 Cal.  
18 App. 5th 93, 102 (2020); *Lange v. Monster Energy Co.*, 46 Cal. App. 5th 436, 445  
19 (2020); *OTO, L.L.C. v. Kho*, 8 Cal. 5th 111, 124 (2019); *Ajamian v. CantorCO2e,*  
20 *L.P.*, 203 Cal. App. 4th 771, 795-97 (2012).  
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23 19. The court weighs the relative degree of procedural and  
24 substantive unconscionability. Where the arbitration has a low degree of  
25 procedural unconscionability, the court must enforce it unless the court finds a high  
26 degree of substantive unconscionability. See *Cook v. Univ. of S. Cal.*, 2024 WL  
27  
28

1 2495500, at \*4 (Cal. App. 2d May 24, 2024); *Ramirez v. Charter Comm's, Inc.*, 75  
2 Cal. App. 5th 365, 372 (2022).)

3 20. In determining whether an agreement is procedurally unconscionable, the court  
4 assesses how the parties made the agreement and determines whether the parties have  
5 unequal bargaining power that oppressed the weaker party, hid terms from the weaker  
6 party, or stripped the weaker party of the ability to make an informed choice.  
7 See *Bielski v. Coinbase, Inc.*, 97 F.4th 1003 (9th Cir. 2023) (applying California  
8 law); *Ramirez v. Charter Comms., Inc.*, 2024 WL 3405593 at \*3 (Cal. July 15,  
9 2024); *Gostev*, 88 Cal. App. 5th at 1054; *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064,  
10 1071 (2003); *Domestic Linen Supply Co., Inc. v. L J T Flowers, Inc.*, 58 Cal. App. 5th  
11 180, 182 (2020) (affirming denial of petition to compel arbitration because the  
12 arbitration clause in the parties' contract was "as inconspicuous as a frog in a thicket  
13 of water lilies"); *Torrecillas v. Fitness International, LLC*, 52 Cal. App. 5th 485, 493  
14 (2020); *Lange*, 46 Cal. App. 5th at 452; *Ajamian*, 203 Cal. App. 4th at 796.) The  
15 language providing for arbitration and waiving the right to a jury trial must be  
16 apparent but does not need to be highlighted with a large font or bold typeface  
17 (see *Alvarez v. Altamed Health Servs. Corp.*, 60 Cal. App. 5th 572, 583 (2021), *as*  
18 *modified*, (Mar 04, 2021)).

19 21. "The procedural element of an unconscionable contract generally takes the form  
20 of a contract of adhesion." *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071,  
21 130 Cal.Rptr.2d 892, 63 P.3d 979 (*Little*.) An adhesive contract is defined as " 'a  
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1 standardized contract, which, imposed and drafted by the party of superior bargaining  
2 strength, relegates to the subscribing party only the opportunity to adhere to the  
3 contract or reject it.’ [Citation.]” *Cook v. U. of S. California*, 321 Cal. Rptr. 3d 336,  
4 342–43 (Cal. App. 2d Dist. 2024), *reh’g denied* (June 13, 2024). Even the choice-of-  
5 law provisions contained in contracts of adhesion are usually respected. *Windsor*  
6 *Mills, Inc. v. Collins & Aikman Corp.*, 101 Cal. Rptr. 347, 353 (Cal. App. 2d Dist.  
7 1972); Restatement 2d, Conflict of Laws, s 187, Comment b; *Player v. Geo. M.*  
8 *Brewster & Son, Inc.*, 18 Cal.App.3d 526, 533, 96 Cal.Rptr. 149 (1971).

11 22. In determining whether an agreement is substantively unconscionable, the court  
12 considers the fairness of the agreement’s terms. See *Ramirez*, 2024 WL 3405593 at  
13 \*4; *Bielski*, 97 F.4th 1003 (9th Cir. 2023) (applying California law); *Fuentes*, 90 Cal.  
14 App. 5th at 919 (2023); *Basith v. Lithia Motors, Inc.*, 90 Cal. App. 5th 951  
15 (2023); *Gostev*, 88 Cal. App. 5th at 1054; *Torrecillas*, 52 Cal. App. 5th at 496-  
16 97; *Lange*, 46 Cal. App. 5th at 451-52; *Lima v. Gateway, Inc.*, 886 F. Supp. 2d 1170,  
17 1181-82 (C.D. Cal. 2012); *Armendariz*, 24 Cal. 4th at 117-18). Mutuality is the most  
18 important factor (*Baxter v. Genworth N. Am. Corp.*, 16 Cal. App. 5th 713, 736  
19 (2017); *Pokorny v. Quixtar, Inc.*, 601 F. 3d 987, 997-98 (9th Cir. 2010)). Generally,  
20 “unconscionability is determined as of the time the contract was entered into, not in  
21 light of subsequent events.” *Parada v. Super. Ct.*, 98 Cal. Rptr. 3d 743, 767 (Cal. App.  
22 4th Dist. 2009). Courts only find unconscionability on the basis of cost when the  
23 financial burden of arbitrating is so onerous that it effectively deprives the party of a  
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1 forum for justice. See *Cook*, 2024 WL 2495500, at \*5-6; *Ramirez*, 75 Cal. App. 5th  
2 at 373-76; *Weiler v. Millichap Real Estate Inv. Servs., Inc.*, 22 Cal. App. 5th 970, 978-  
3 79 (2018); *Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638, 657 (2004);  
4 *Gutierrez v. Autowest, Inc.*, 114 Cal.App.4th 77, 98 (Cal. Ct. App. 2003). Court also  
5 considers the amount of the remedies sought relevant to the substantive  
6 unconscionability determination. *Gutierrez*, 114 Cal.App.4th at 98.  
7

8  
9 23. Turning to the facts at hand, Plaintiffs have not shown that the arbitration  
10 agreement was procedurally or substantively unconscionable. The Plaintiffs are  
11 sophisticated investors, willing and able to pay \$55,000 each for the chance to start  
12 an online business through Amazon.com. They were not the “weaker party” in any  
13 sense that would shock the conscience.  
14

15 24. The terms of the arbitration agreement were in all caps in an addendum to the  
16 contract, even though the law does not require such emphasis. No one hid the contract  
17 terms from Plaintiffs; they had plenty of time to consider the proposal before they  
18 decided to invest.  
19

20 25. The Plaintiffs were not consumers, but rather commercial investors seeking to  
21 create a profit-producing enterprise, and with substantial liquid resources to put  
22 toward the endeavor. Consequently, assertions that the contract was one of adhesion  
23 are misplaced. An adhesion analysis is improper for such arms-length negotiations  
24 between business people.  
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1 26. The arbitration agreement was also substantively valid in light of its mutuality,  
2 and the fact that the Plaintiffs have all the same claims, defenses, and remedies  
3 available to them as do the Jurisdictional Defendants.

4  
5 27. With respect to the costs of arbitration, the arbitration agreement is  
6 substantively valid for two reasons: 1) the Plaintiffs massively overstate the costs of  
7 arbitration, and 2) the costs of arbitration are within the means of the Plaintiffs  
8 collectively in light of their ability to invest large sums of money and the amount of  
9 damages they seek.

10  
11 28. The Plaintiffs collectively appear to be able to afford the fees needed to initiate  
12 the arbitration. Each plaintiff, at the time the arbitration clause was agreed to, had  
13 sufficient funds to invest \$55,000. Collectively, that should put the costs of arbitration  
14 well within reach. Moreover, the extreme amount of damages the Plaintiffs  
15 collectively seek (\$57,000,000) is one tenth of even the generous cost estimate offered  
16 by Opposing Counsel, and puts those costs in perspective.

17  
18 29. The *Gutierrez* case, cited by Plaintiffs *Gutierrez*, is prime example of how the  
19 damages sought have to be considered when evaluating the costs of arbitration. 114  
20 Cal.App.4th at 98. In *Gutierrez*, the plaintiffs showed that to arbitrate their claims,  
21 they would have to pay at least \$20,800. *Id.* The court declined to compel the plaintiffs  
22 to arbitrate their claims, holding that such arbitration costs “were prohibitive *for losses*  
23 *ranging from \$44,000 to \$130,000.*” *Parada v. Superior Court* (Monex Deposit Co.),  
24 176 Cal.App.4th 1554, 1581 (Cal. Ct. App. 2009).

### III. CONCLUSION AND PRAYER

30. Based on the foregoing and for good cause shown, the Jurisdictional Defendants respectfully request that this Court grant their Amended Motion to Compel Arbitration and Motion to Stay and enter an order (1) compelling all of Plaintiffs' claims herein to binding arbitration; and (2) staying this proceeding until the final resolution of the arbitration. The Jurisdictional Defendants pray for such other and further relief to which the Jurisdictional Defendants may show themselves to be justly entitled.

Dated: August 9, 2024.

Respectfully submitted,

By: /s/ William H. Shibley

William H. Shibley

Attorney-in-Charge

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**CERTIFICATE OF COMPLIANCE**

The undersigned, counsel of record for Defendants, certifies that this Motion contains 2,630 words, which complies with the word limit of L.R. 11-6.1

/s/ William H. Shibley  
William H. Shibley

**CERTIFICATE OF CONFERENCE**

I hereby certify that I conferred with counsel for Plaintiffs, via telephone conference on June 27, 2024, regarding the substance of the foregoing motion. Plaintiffs are opposed to this Motion.

/s/ William H. Shibley  
William H. Shibley

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document, and any attachments, will be served to counsel of record, in accordance with the governing rules of procedure regarding service in this court on this **August 9, 2024**, via email as follows:

/s/ William H. Shibley  
William H. Shibley